75-1071

Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MURRAY BOGATIN,

Petitioner,

against

~~THE PEOPLE OF THE STATE OF~~ NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MURRAY BOGATIN
Attorney for Petitioner
286 Handsome Avenue
Sayville, New York 11782
(516) 589-3774

TABLE OF CONTENTS

	Page
Opinions Below	1
Citations to Opinions Below	2
Statement of Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statute Involved	
Article V	4
Article VI	4
Article XIV, Section 1	4
Section 215.51 of New York State Penal Law	5
Statement of the Case	5
Reasons for Granting the Writ	
I. The Decision of the New York Courts is in Conflict with Long Established Constitutional and Decisional Law	13
II. The Decision of the New York Courts is in Conflict with the Spirit and Holding of the Cases of Lefkowitz v. Newsome, 420 U.S. 283, and Blackledge v. Perry, 417 U.S. 21.	15

Table of Contents

	Page
Conclusion	20
Appendix "A"	21
Appendix "B"	22
Appendix "C"	23

CASES CITED

Miranda v. Arizona, 384 U.S. 436 ...	14
Escobedo v. Illinois, 378 U.S. 478 .	14
Gideon v. Wainwright, 372 U.S. 335 .	14
People v. Ianniello, 21 N.Y.2d 418, 325	15
Albrecht v. United States, 273 U.S. 1	15,16
Weeks v. United States, 216 F. 292, 235 U.S. 697	15
Lefkowitz v. Newsome, 420 U.S. 283 .	15,19
Blackledge v. Perry, 417 U.S. 21 ...	15
People v. Scott, 3 N.Y.2d 148	16,18

Cases Cited

	Page
People v. Maggio, 16 A.D.2d 820	16,19
People v. Baranello, 24 A.D.2d 637 .	17,19
People v. Ortiz, ___ N.Y.2d ___	18
People v. Johnson, ___ N.Y.2d ___ ..	18
People v. Gorgone, 47 A.D.2d 347 ...	19

UNITED STATES CONSTITUTION

Fifth Amendment	2,3,4
Fourteenth Amendment	3,4
Sixth Amendment	3,4

STATUTES CITED

28 U.S.C. Sec. 1257(3)	2

In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

MURRAY BOGATIN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Murray Bogatin, prays that a writ of certiorari to review the order of the Court of Appeals of the State of New York which denied leave to appeal to said court from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed a judgment of the County Court, County of Suffolk, dated November 21, 1973,

convicting petitioner of the crime of attempted criminal contempt by refusal to testify before a grand jury after having been granted immunity, and imposing a fine in the sum of $1,000.

CITATIONS TO OPINIONS BELOW

The New York State Court of Appeals in denying leave to appeal from the affirmance by the Appellate Division rendered no opinion. A copy of the decree, dated October 30, 1975, denying leave is printed in the Appendix, infra, page 21.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, affirming the judgment of conviction of the County Court, County of Suffolk, is reported as 48 A.D.2d 674 (N.Y. 1975), and is printed in the Appendix, infra, page 22.

STATEMENT OF JURISDICTION

The decree of the Court of Appeals of the State of New York, denying leave to appeal to that Court, which petitioner seeks to have this Court review, was entered on October 30, 1975. The statutory provision believed to confer on this Court jurisdiction to review the decree in question is 28 U.S.C. § 1257(3). Petitioner also claims that his rights under the Fifth and

Fourteenth Amendments to the United States Constitution were violated when he was held to answer an insufficient indictment based upon insufficient evidence before the Grand Jury. Petitioner also claims that his right under the Sixth Amendment to have the assistance of counsel was violated. Petitioner finally claims that he did not waive his constitutional rights to due process of law and the equal protection of the laws under the Fourteenth Amendment by entering a voluntary plea of guilty to the crime of attempted criminal contempt.

QUESTIONS PRESENTED

Whether a defendant is denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution when he is held and compelled to answer an indictment of a Grand Jury where the indictment does not state a crime and where the evidence before the Grand Jury is not legally sufficient to establish the crime charged in the indictment.

Whether a witness is denied his right to have the assistance of counsel in violation of the Sixth Amendment when he is compelled to testify before a State Grand Jury after refusal of his request for the assistance of counsel.

Whether a defendant is denied due pro-

cess of law in violation of the Fourteenth Amendment when he is compelled to waive his objections to the jurisdiction of the local court over the alleged crime and over his person upon the entry of a voluntary plea of guilty to a reduced charge of said crime.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendments to Constitution of the United States:

Article V — "No person shall be held to answer for a...crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty or property, without due process of law..."

Article VI — "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation...against him...and to have the Assistance of Counsel for his defense."

Article XIV, Section 1 — "...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person...the equal protection of the laws."

Section 215.51 of New York State Penal Law

"A person is guilty of criminal contempt of a Grand Jury where, after having been granted immunity, he refuses to be sworn as a witness before a Grand Jury, or who, after being sworn as such a witness, refuses to answer any legal and proper interrogatory."

STATEMENT OF THE CASE

This petition seeks to have this Court review a decree of the Court of Appeals of the State of New York which refused to review the affirmance by the Appellate Division of the Supreme Court of the State of New York of a judgment of the County Court, County of Suffolk, dated November 21, 1973, convicting petitioner, upon his voluntary plea, of the crime of attempted criminal contempt in violation of Section 215.51 of

the New York State Penal Law for which petitioner was fined the sum of $1,000.

However, prior to petitioner's arrest and indictment thereunder, the Suffolk County Grand Jury was investigating five individuals suspected of engaging in criminal usurious activities. In this connection petitioner, an attorney, was called before said body as a witness.

Petitioner throughout his appearance before the Grand Jury requested the right to seek assistance of counsel, but was denied each time. Two of these requests are set forth as follows:

> "...since there has been a horrendous statement of fact by (prosecutor) I would seek adjournment to seek the aid of counsel."[1]

When the prosecutor indicated an adjournment would inconvenience the Grand Jury, the court denied the request as follows:

> "...Mr. Bogatin...due to your expertise...I would ask you to go back and answer..."[2]

---

1. See pages 63-64 of Grand Jury minutes.
2. Id., page 64.

The court's refusal to inconvenience the Grand Jury is further noticed from the following at page 67 of the testimony:

> "I don't believe Mr. Bogatin is in need of any counsel. I'm not going to adjourn the matter any further. I'm directing you to go back to the Grand Jury and proceed."

At that point petitioner further explained his desire for counsel as follows:

> "...I'm aware of the fact that I am an attorney...(but) here I am an individual, be I an attorney or otherwise, I feel, under the circumstances, I wish to be represented. I do have that right, I do request it. If Your Honor denies it..."
>
> THE COURT: "I have already denied it."

At a later point petitioner advised the court that he had complied with instructions. However, when the court disagreed, petitioner again at page 120 requested counsel as follows:

> "And under the circumstances, I certainly request the opportunity to seek legal counsel to see if I can be advised to see whether he's considered that I've complied and indicate what course of action to take, and even though I am an attorney, I've been

here in my individual capacity and as such, I feel that I am entitled to representation if I desire. Perhaps the matter would be clearer to me if I had an attorney who would be able to explain the situation to me. I think I have complied. I think I have answered -- if I'm wrong in my -- some attorney can indicate so to me; I then would come back."

After repeated refusal by the court petitioner again seriously requested the assistance of counsel as is set forth on pages 122-123:

"If Your Honor feels I should go back again, I would certainly request the opportunity of consulting with counsel at this point and since I've been here three times and in my thinking, I've complied with all the instructions of the court, it's not my intention not to comply with the directions. If it was my intention at the start, I wouldn't have been here to start with."

On page 123 petitioner found it necessary to remind the court that the need to seek counsel was "not an outrageous request."

Finally, the court being adamant in its refusal directed petitioner to show cause the following morning at 9:30 A.M. in open court why he should not be punished for contempt. Yet this time the court reminded petitioner to be sure to appear with an attorney.[3]

After hearing of the contempt charge, petitioner replied as follows at page 125:

"The only way I can comply -- I can't without knowing what my legal position is, without consulting with an attorney for independent advice. I think I should be given the same opportunity as a layman would. The mere fact that I am a lawyer should not, in any way, deprive me of the right."

In conclusion petitioner stated to the court at page 126 as follows:

"You're depriving me of any right to consult with counsel."

Upon the return date of the contempt citation the contempt proceedings were dismissed upon the court's own action.[4]

Subsequently, petitioner was indicted for two counts of perjury and one count of

---

3. Id., page 123.

4. See pages 281-292 of Record on Appeal to Appellate Division of Supreme Court of the State of New York (1972).

criminal contempt pursuant to Section 215.51 of the New York State Penal Law. The indictment was based solely upon the testimony given by petitioner as a witness in his appearance before the aforesaid Grand Jury. No other matter is contained or alleged in the indictment.

Thereafter, petitioner before trial made timely motion in the trial court to dismiss the indictment on the ground the court lacked jurisdiction over the subject matter because the indictment did not state a crime and also because the evidence before the Grand Jury was not legally sufficient to establish the crime charged in the indictment.

The trial court granted the motion to dismiss the criminal contempt count of the indictment and held as follows:

> "The Court has scrutinized both the grand jury minutes and the minutes of the proceedings which transpired before Judge Lundberg, and after a careful reading thereof, one must conclude that ...the defendant...after being appropriately admonished by the court, and instructed as to the propriety and pertinency of the questions put to him before the grand jury, he did answer all of the questions as directed by the court."[5]

---

5. See pages 9-10, id.

The District Attorney then appealed the decision to the Appellate Division of the Supreme Court of the State of New York, and that court reversed and reinstated the criminal contempt charge. Petitioner then made application for leave to appeal from said reversal to the Court of Appeals of the State of New York which was denied by then Associate Judge Charles H. Breitel (now Chief Judge). However, upon oral argument, Judge Breitel appeared to indicate he, too, believed the criminal contempt charge was legally insufficient, but he denied leave to appeal on the ground that he would not burden the time of the Court of Appeals with an appeal from what he considered only an intermediate order. He also stated that such order could be reviewed ultimately if there would be a judgment of conviction.

Previously, the Grand Jury jointly indicted the aforesaid five individuals under investigation for usury. These men were tried before County Court Judge Gordon Lipetz and at that trial petitioner represented one of the individual defendants.

Judge Lipetz had a reputation for being a favorite judge of the prosecutor's office[6] and thereafter petitioner's trial

---

6. On April 23, 1971, Newsday (a major daily N.Y. publication) at page 20, attributed the following to a Suffolk

was maneuvered before Judge Lipetz. When petitioner's several motions to have the case removed to another judge for trial were denied, petitioner entered a voluntary plea of guilty to the crime of attempted criminal contempt as a misdemeanor at which time the other counts of the indictment were dismissed. For sentence the court imposed a fine in the sum of $1,000.

Although petitioner knowingly plead guilty, he did not admit any wrongdoing.[7] He took the plea to avoid what he believed would be an unfair trial before Judge Lipetz resulting in felony convictions and automatic disbarment. He took the plea knowing that the court lacked jurisdiction over the indictment and that an appeal still could be prosecuted from the voluntary plea in order to protect his constitutional rights. After all he also remembered that Court of Appeals Judge Breitel had stated he would be able to appeal to the Court of Appeals after a conviction.

Petitioner then appealed the conviction to the Appellate division of the Supreme Court of the State of New York asserting as

---

County Ass't. Dist. Atty:
"We have only one judge we like to put cases before and that's Lipetz."

7. See change of plea stenographic minutes.

error that he was deprived of his Federal constitutional rights when he was convicted of a crime over which the County Court had no jurisdiction because the indictment did not charge a crime and was based upon insufficient evidence and also that he was not permitted to have the assistance of counsel at his Grand Jury appearance. The Appellate Division passed upon these Federal questions by holding that petitioner's voluntary plea waived all right to appeal and thereupon affirmed the conviction as free of error.[8]

Associate Judge Sol Wachtler thereafter denied petitioner's application for leave to appeal to the Court of Appeals of the State of New York, without opinion, thereby indicating that the voluntary plea waived all right to appeal and thus rejected petitioner's Federal arguments. At that point state judicial remedies were exhausted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NEW YORK COURTS IS IN CONFLICT WITH LONG ESTABLISHED CONSTITUTIONAL AND DECISIONAL LAW.

The constitutional right to the assistance of counsel in a criminal case is most

---

8. See Appendix, infra, page 23.

elemental and needs little exhortation. The cases are legion, such as, Miranda v. Arizona, 384 U.S. 436; Escobedo v. Illinois, 378 U.S. 478; and Gideon v. Wainwright, 372 U.S. 335.

The court below committed serious constitutional error when it refused to extend the right to counsel for Grand Jury appearances.

Although petitioner is an attorney, he was still entitled to the right of representation by counsel in connection with the appearance before the Grand Jury as herein. John Mitchell, the former Attorney General of the United States, in his appearances before a Grand Jury was represented by counsel, even though he was the highest legal officer of the country.

The recent Watergate experiences before the various Federal committees clearly demonstrate the proper need for legal counsel for all witnesses. Not a sole lawyer-witness was without counsel in attendance.

The Court of Appeals of the State of New York has recognized the right of a non-lawyer witness before a Grand Jury to enjoy the assistance of counsel. Chief Judge Breitel recently held as follows:

> "Whenever a witness demands to see his lawyer for counselling concerning his

> legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so." People v. Ianniello, 21 N.Y.2d 418, 325.

It is also well established that a court does not have jurisdiction over an indictment which fails to state or charge a crime or which is based on insufficient Grand Jury evidence. See Albrecht v. United States, 273 U.S. 1, and Weeks v. United States, 216 F. 292, 235 U.S. 697.

II. THE DECISION OF THE NEW YORK COURTS IS IN CONFLICT WITH THE SPIRIT AND HOLDING OF THE CASES OF LEFKOWITZ v. NEWSOME, 420 U.S. 283, AND BLACKLEDGE v. PERRY, 417 U.S. 21.

The courts below have held, in effect, that the voluntary plea entered by petitioner waived all rights. The courts did not distinguish between jurisdictional rights, non-jurisdictional rights, constitutional rights (existing or future), statutory rights, decisional rights, substantial rights, etc.

Petitioner respectfully claims that he had jurisdictional and due process rights which were not waived by the voluntary plea.

An indictment which fails to charge a crime is jurisdictionally defective and must

be dismissed even after a voluntary plea is interposed. Such an indictment is void ab initio, it never becomes valid.

See Albrecht v. United States, 273 U.S. 1; People v. Scott, 3 N.Y.2d 148; and People v. Maggio, 16 A.D.2d 820, rev'd on other grounds, 12 N.Y.2d 789.

In prior cases the New York courts have held that a voluntary plea does not waive jurisdictional defects.

In the case of People v. Scott, 3 N.Y.2d 148, defendant entered a voluntary plea of guilty to operation of a motor vehicle while intoxicated. The Appellate Division affirmed the conviction but the Court of Appeals reversed, holding as follows on page 152:

> "However, objections to the jurisdiction of the court are not waived, nor is the objection that the (indictment) does not state a crime."

Likewise in the case of People v. Maggio, 16 A.D.2d 820, defendant entered a voluntary plea to the crime of sodomy. However, the Appellate Division reversed the conviction holding as follows:

> "Defendant's plea of guilty...does not preclude him from thereafter challenging such count on the ground that it does not charge a crime, since the plea admits only the facts as alleged and does

> not create a punishable offense when none is in fact charged against the defendant...In our opinion, the first count is insufficient as matter of law...Accordingly defendant's plea is a nullity, the judgment must be reversed and count one of the indictment dismissed, since it is also insufficient..."

Although the Maggio decision was reversed by the Court of Appeals (12 N.Y.2d 789), it was reversed on other grounds and the cited portion herein was not disturbed on review.

It is also salutary to look at the case of People v. Baranello (New York), 24 A.D.2d 637, wherein defendant entered a voluntary plea of guilty to the crime of omission of duty by a public officer. The plea, incidentally, was taken in the same County Court as herein.

However, the Appellate Division reversed the conviction in holding as follows on page 638:

> "We find that the indictment on its face fails to state a crime. Such objection is not waived by a plea of guilty...In addition...the evidence submitted to the Grand Jury was legally insufficient..."

While it must be conceded by petitioner that a great number of rights are waived by the entry of a voluntary plea of guilt, the

courts below herein took the erroneous view that all rights are waived. This view, of course, is wrong and actually violated petitioner's constitutional rights.

Jurisdictional defects are never waived. If jurisdiction is absent, it remains absent forever.

The Appellate Division ignored all of petitioner's constitutional arguments by holding that his voluntary plea "waived all nonjurisdictional defects". The Court of Appeals compounded this error by denying leave to appeal.

The holding below herein that the voluntary plea waived all issues is also contrary to prior established New York case law.

The New York courts have always recognized that certain substantial issues such as jurisdiction, due process and substantial final rights are not waived by voluntary pleas. See the following cases:

1. People v. Scott, 3 N.Y.2d 148.

2. People v. Ortiz, ___ N.Y.2d ___, decided Feb. 19, 1975.

3. People v. Johnson, ___ N.Y.2d ___, decided Dec. 14, 1975.

4. People v. Gorgone, 47 A.D.2d 347.

5. People v. Baranello, 24 A.D.2d 637.

6. People v. Maggio, 16 A.D.2d 820, rev'd on other grounds.

Thus, by its own decisional law, New York has granted to defendants the right to appeal jurisdictional defects after a voluntary plea of guilt.

The recent decision of this court in Lefkowitz v. Newsome, 420 U.S. 283, clearly states that where New York by statute permits an appeal after a guilty plea, then Federal remedies may be invoked if an appeal is refused by the state.

This court held as follows at page 293:

> "Accordingly, we hold that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal...proceeding."

Thus, it is respectfully claimed that decisional law should and must be treated the same as statutory law so that petition-

er's writ should be granted.

In another case this court also held that a voluntary plea of guilt did not preclude a defendant from raising his constitutional claims. See Blackledge v. Perry, 417 U.S. 21.

CONCLUSION

This court should grant the writ to settle the question that a voluntary plea does not waive jurisdiction defects and that attorney-witnesses are entitled to have the assistance of counsel at Grand Jury interrogations.

Respectfully submitted,

MURRAY BOGATIN
Attorney for Petitioner
286 Handsome Avenue
Sayville, New York 11782
(516) 589-3774)

APPENDIX "A"

"12. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MURRAY BOGATIN, Appellant--Appeal by defendant from a judgment of the County Court, Suffolk County, rendered November 21, 1973, convicting him of attempted criminal contempt, upon his plea of guilty, and sentencing him to a fine of $1,000. Judgment affirmed. By his guilty plea defendant waived all nonjurisdictional defects (People v La Ruffa, 40 AD2d 1022, aff'd 34 NY2d 242; People v Schiskey, 39 AD2d 608). The other contentions raised by defendant have been considered and found to be without merit. Latham, Acting P.J., Christ, Munder and Shapiro, J.J., concur."

APPENDIX "B"

At a Term of the Appellate Division of the Supreme Court of the State of New York Second Judicial Department, held in Kings County on November 27, 1972

PRESENT, J. IRWIN SHAPIRO, Acting Presiding Justice

[redacted]
HON. JAMES D. HOPKINS
[redacted]
[redacted]
[redacted]
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
Associate Justices

The People, etc.,

Appellant,

v.

Murray Bogatin,

Respondent.

Order on Appeal from Order

In the above entitled cause, the above named The People, etc., plaintiff,

so much of

having appealed to this court from an order of the County Court, Suffolk

County dated January 11, 1972, as granted the branch of defendant's motion which was to dismiss the third count of the indictment (criminal contempt by refusal to testify before a Grand Jury after having been granted immunity [Penal Law, § 215.51]);

and the said appeal having been argued by Ira Harris Simon,

Esq., of counsel for the appellant, and submitted by Ernest J. Peace, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

opinion and decision slip heretofore filed and made a part hereof, it is

insofar as

ORDERED that the order appealed from is hereby unanimously reversed, on the law, motion denied insofar as it was to dismiss the third count of the indictment and said count reinstated.

Enter:

IRVING N SELKIN

Clerk of the Appellate Division

BEST COPY AVAILABLE

APPENDIX "C"

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against
MURRAY BOGATIN

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
October 30, 19 78

Associate Judge

*Description of Order: Judgment of County Court, Suffolk, November 21, 1973; affirmed by Appellate Division, Second Department, May 13, 1975.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1071

Supreme Court, U. S.
FILED
MAR 17 1976
MICHAEL RODAK, JR., CLERK

MURRAY BOGATIN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certorari to the State of New York Court of Appeals

---

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

HENRY F. O'BRIEN
District Attorney
Suffolk County
Criminal Courts Building
Center Drive South
Riverhead, New York 11901
(516) 727-1440

CHARLES M. NEWELL
Assistant District Attorney
of Counsel

TABLE OF CONTENTS

	Page
Introduction----------	1
Statement of Facts----------	2
Opinion Below----------	21
Jurisdiction----------	21
Questions Presented----------	22
Statutes Involved----------	23
Argument	
Point One - The petition for a writ of certiorari is improperly addressed to the New York State Court of Appeals----	24
Point Two - The indictment clearly and specifically states a crime under New York Law and the claim that there was insufficient evidence before the Grand Jury to support this charge does not involve a substantial Federal question. Therefore, no jurisdictional defect is alleged which survived the Petitioner's voluntary plea of guilty----------	25
Point Three - There is no absolute Federal constitutional right to the assistance of counsel during an appearance before the Grand Jury----------	29
Conclusion----------	32

TABLE OF AUTHORITIES

Cases:	Page
Blackledge v. Perry, 417 U.S.21 (1974)---	28
Boyd v. Dutton, 405 U.S.1 (1972)---------	29
Coleman v. Alabama, 399 U.S.387 (1970)---	29
Hammerstein v. Superior Court of California, 341 U.S. 491 (1951)----	24
Hurtardo v. California, 110 U.S. 516 (1884)-------	27
In Re Groban, 352 U.S. 330 (1957)--------	29
In Re Grumbles, 453 F. 2d 119 (CA, 3rd Cir., 1971),cert. denied 406 U.S.932-	30
Lawn v. United States, 355 U.S.339(1958)--	28
McMann v. Richardson,397 U.S.759 (1970)---	28
Mellon v. O'Neil, 275 U.S.212 (1927)------	25
Mempha v. Rhay, 389 U.S.128 (1967)--------	29
Miranda v. Arizona, 384 U.S.436----------	30
Moore v. Missouri, 159 U.S. 673 (1895)-----	28
Morford v. Hocker, 394 F.2d 169 (CA, 9th Cir.) cert. denied 392 U.S.944-------	27
People v. Ianniello, 21 N.Y.2d 418 (1968) cert denied 392 U.S.827----------	27,30,32
Randall v. Tippecanoe County, 211 U.S. 252 (1923) ----------	24

TABLE OF AUTHORITIES (Cont'd)

Case:	Page
Re Robertson, 156 U.S. 183 (1895)--------	28
Santobello v. New York, 404 U.S. 257 (1971)--	29
Tollett v. Henderson, 411 U.S. 258 (1973)----	29
United States ex.rel. Buonoraba v. Commissioner of Correction, City of New York, 316 V. Supp. 556 (S.D.N.Y., 1970)----------	31-32
United States v. Costello, 350 U.S.359 (1956)	28
United States v. Fitch, 472 F. 2d 548 (CA, 9th Cir., 1973) cert. denied 412 U.S. 954----------	30
United States v. Wade, 388 U.S.218 (1967)---	29
Western Union Telegraph Co. v. Priester, 276 U.S. 252 (1928)----------	24

Statutes:

28 U.S.C. Section 1257 ----------	24
39 McKinney's Consolidated Laws of New York (Penal Law) Section 215.51--	26
66 McKinney's Consolidated Laws of New York (Former Code of Criminal Procedure) Section 619-C(3)----------	26,31

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1071

MURRAY BOGATIN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

INTRODUCTION

This is a brief in behalf of Respondent in opposition to a petition for a writ of certorari to the Court of Appeals of the State of New York.

STATEMENT OF FACTS

On July 19, 1971, the extended June 1970 Organized Crime Grand Jury met to inquire into the commission of the crimes of Conspiracy to Commit Criminal Usury, Criminal Usury, and Conspiracy to Commit Extortion.

Prior to July 19th, the Suffolk County District Attorney's Office conducted an investigation into loansharking that lasted approximately one year.

During the course of its investigation, the District Attorney's Office received information that Murray Bogatin, Esq., an attorney whose practice is located in Suffolk County, was a victim of the loansharking operation.

Approximately one week prior to July 19th, Murray Bogatin appeared at the District Attorney's Office. He was told that an investigation conducted by the Rackets Bureau had revealed that he and other individuals were the victims of an usurious loansharking operation. He was told the amount of his loan, the amount of "vig" he was paying, how much he was paying each week, how long he had been paying, and his designated payment day. He was told that he was not a target of the investigation which was concerned only with the loansharks. He was also told that he and other victims would be subpoenaed to testify before a Grand Jury regarding this loanshark operation.

Bogatin asked for time to consult with an attorney and, even though he is an experienced criminal lawyer and one who frequently has represented defendants in criminal usury cases, he was given an opportunity to consult with counsel. On July 19th, Murray Bogatin, having been subpoenaed to appear before the Grand Jury, appeared and was sworn as a witness. He answered a few introductory questions and then declined to answer unless given immunity. It was recommended that the Grand Jury confer immunity on Bogatin, and they thereafter voted and conferred immunity on him. It was then explained to Bogatin what effect on him the conferral of immunity had, and the proceedings continued.

Thereafter, for approximately five hours Murray Bogatin, Esq., executed a plan to frustrate the legitimate inquiry of the Grand Jury. He had to be taken before a judge of the County Court on three separate occasions and on the third occasion he was ordered by Suffolk County Court Judge Lundberg to show cause why he should not summarily be held in contempt.

Additionally, the Grand Jurors voted to indict Bogatin for Contempt and Perjury as a result of his conduct and testimony before them. After immunity was conferred upon Bogatin, he was asked whether or not he was in need of money in January, 1971. His response was that the question was outside the scope of the investigation as it pertained to him. He persisted in this kind of response and was told by the Prosecutor the relevance of the question, to wit: that the answer would show that Bogatin solicited a certain individual for a loan. Still, Bogatin persisted in refusing to answer.

Bogatin was then asked if he ever approached Bill Murray and told him that he needed three thousand dollars. Bogatin objected to the form of the question. He was then questioned as to whether he asked Bill Murray for three thousand dollars, and he declined to answer on the basis of a confidential relationship with Murray. When asked whether he represented Murray before the Grand Jury, he answered that he did not currently represent Murray.

Thereafter, he persisted in claiming that there was a priviliged relationship between him and Murray and, when he was directed by the Foreman of the Grand Jury to answer the question, he said he could not answer the question the way it was worded.

The questioning then turned to Bogatin's knowledge of Joe Lombardi, one of the alleged loansharks, and Bogatin refused to answer on the basis of a priviliged relationship with Lombardi. When asked the basis of his claim, he stated that he had discussed personal legal matters with Lombardi

and had represented member of his family in legal matters. He was asked if he presently represented Lombardi on anything and the answer was no. He was then told that there was no valid claim of privilege since he did not represent Lombardi with regard to the Grand Jury investigation and, even if he did, there is no privilige where a crime is committed.

Additionally, Bogatin was told that the Grand Jury had been hearing evidence concerning the crime of Criminal Usury in which Lombardi and others had been named as participants, and that there was evidence adduced before the Grand Jury that he (Bogatin) took a usurious loan with Lombardi, Tom Sala and Frank Andosca, and that Tom Sala had made collections from him.

Thereafter, he was questioned about the place where he allegedly obtained the loan, a bar located in Queens, New York, known as the Cloud Room. Bogatin was aked if he ever met a man named Tommy in the Cloud Room in 1971. His response was to ask where the Cloud Room was located, even

though, as his later testimony indicated, he knew its location. When told that the Cloud Room was in Queens, he refused to answer the question, stating that it was improper.

He was directed by the Foreman to answer the question and he refused, saying the inquiry was without the jurisdiction of the Grand Jury. The Grand Jury was then advised by the Prosecutor that if a crime is committed partly in one county and partly in another, or if a conspiracy crosses county lines, then either county has jurisdiction. The Prosecutor also restated the purpose of the inquiry to Bogatin (R., pp. 86,87).

Thereafter, Bogatin was aked if he paid one hundred twenty ($120) dollars a week interest on a three thousand dollar loan from January of 1971. He responded that the Prosecutor was presupposing a fact not in evidence yet, that a loan was made, and he therefore could not answer the question.

He was asked if he made one hundred twenty ($120) dollars weekly payments to Tom Sala or Joe Lombardi every Sunday in the County of

Suffolk from January of 1971 into July of 1971, and he persisted in refusing to answer on the grounds of "facts not in evidence." He continued in his refusal to answer although ordered by the Foreman to do so.

The Prosecutor then inquired of Bogatin whether he received two thousand dollars in the Cloud Room in Queens County in January of 1971, from Frank Andosca and Tom Sala, and he refused to answer on the ground that the question referred to a transaction that took place outside of Suffolk County. Though directed by the Foreman to answer, he persisted in his refusal.

Bogatin was then asked questions pertaining to the identity of Tom Sala, a man who allegedly was face to face with him almost every week for five or six months and he objected to the form of the question and indicated that he knew several Tommies. He was shown a photo of Tom Sala and he stated it could be him but he wasn't sure. When asked whether he was face to face with Sala on numerous occasions he said if that was a picture

of the Tom he knew, he had seen hin on several occasions.

Bogatin was aked whether he made payments of $120 on various Sundays to the Tom he knows and he refused to answer, saying that the question was improperly prased. He was ordered to answer by the Foreman, but nevertheless persisted in his refusal on the ground that the Prosecutor was assuming facts not in evidence before the Grand Jury.

Bogatin was asked whether he received one thousand dollars from Bill Murray in January of 1971, and his answer was to question what the Prosecutor meant by the word receive. Therafter, he admitted that he received around eight hundred dollars from Bill Murray in January of 1971, but, when asked what it was for, he refused to answer, stating that it had nothing to do with any transaction that took place in Suffolk County.

Bogatin was then asked if the one thousand dollars was part of the three thousand dollar loan he took at one hundred twenty dollars per week interest. He first stated that the

Prosecutor was assuming facts not in evidence. When pressed for an answer, he said all he knew was that Murray gave him approximately eight hundred dollars in January.

The questioning then turned to whether Bogatin made one hundred twenty dollar weekly payments in Suffolk County to Tom Sala or Joe Lombardi on consecutive Sundays from February into July and he refused to answer on the ground that the facts were being assumed which were not in evidence. He persisted in his refusal to answer even though he was directed to answer five times by the Foreman of the Grand Jury.

Thereafter, the Prosecutor asked Bogatin if he ever met with anybody in Suffolk County and tell them that he paid more than three thousand dollars interest on a three thousand dollar loan and still owed the principal. He said the question was too broad to answer. When ordered by the Foreman to answer, he asked to whom or where he supposedly made such a statement. Again he was requested to answer, and he reverted to his old dodge that the question assumed facts not in evidence.

Bogatin was asked if he knew a man named Frank Andosca and he said he didn't recognize the name. He was shown a photograph of Frank Andosca and he stated that he didn't recognize the man in the photograph. He was asked if he ever met Frank Andosca in the Cloud Room and he refused to answer because he was being asked about a location outside Suffolk County. He was instructed by the Foreman to answer, and he refused.

The questioning returned to whether Bogatin met with Bill Murray in the County of Suffolk in May of 1971 and agreed that he had paid weekly vig payments of $120 on a three thousand dollar loan and still owed the entire principal. Bogatin responded that the question was beyond comprehension. When pressed for an answer, he said that the question was not worded properly. He was asked what he didn't understand about the question and his answer was that he was asked about four different alternatives. He was again asked what he didn't understand and his answers to this and the next series of questions

were as follows (R., pp. 105-107):

Q. What don't you understand about the question? Let's take it, you tell me what you don't understand about it. A. The first part of the question did I meet with Mr. Murray during the month of May.

Q. I didn't ask you whether you met him at a cocktail party. I asked whether you met him and agreed- A. Agreed what?

Q. That you had paid more than three thousand dollars in interest on a three thousand dollar loan and still owed the entire principal. A. Agreed to whom?

Q. You agreed with Mr. Murray. A. When and where?

Q. In the County of Suffolk? A. When?

Q. I asked you whether you agreed to that in the County of Suffolk in May? A. Look, I know Mr. Murray very well, I have had many conversations with Mr. Murray.

Q. Did you do it on May 16, 1971, one of your Sundays? A. I had many conversations with Mr. Murray.

Q. Now you know when and where on a Sunday, May 16, 1971 what is your next question? A. I have seen him on a few Sundays during May, it may have been May 16th that I did see him, I am not denying having seen him on May 16th.

Q. What about the three thousand interest on the three thousand dollar loan and still owing the principle. A. Well, again you are assuming facts that haven't been established as a usurious loan.

Q. I am asking you whether you said that to him? A. I have had conversations with Mr. Murray many, many times about money.

Q. I am asking about that question and I am not asking about conversations many times, I want to know about this three thousand dollar interest on a three thousand dollar loan and still owing the three thousand dollar principle. A. I have had conversations with Mr. Murray I do not recall the contents specifically of any one conversation, I have had conversations in May, I may well have had a conversation on May 16the with him, I don't recall saying as precise words or the substance of the words that you used.

Q. Did you agree that you owed three thousand dollars? A. I agreed to nothing.

Q. You agreed to nothing. A. On any of the conversations you are talking about.

Mr. Bogatin was then asked a series of questions pertaining to going with Bill Murray into Queens County in January of 1971, meeting with Tom Sala and Frank Andosca and obtaining a three thousand dollar loan at a usurious interest rate. He declined to answer all the questions using the spurious legal argument that the transactions all took place outside of Suffolk County and therefore the Grand Jury had no right to inquire into these matters.

Thereafter, the Prosecutor inquired

whether Bogatin received a thousand dollars in Suffolk County subsequent to this meeting in Queens and if he made $120 weekly interest payments in Suffolk County. He refused to answer these questions, though directed by the Foreman to do so, on the ground that the Grand Jury was assuming facts not in evidence.

It was at this point that Bogatin was taken before Judge Lundberg for the first time. The judge, after hearing Bogatin's testimony read back by the Grand Jury stenographer, directed Bogatin to answer all questions relating to: what transpired in Queens County at the Cloud Room, the payments of any money by Bogatin, and the balance of money outstanding.

Thereafter, the questioning of Bogatin resumed. He was asked if he had a conversation with Bill Murray in January of 1971 in which he mentioned needing three thousand dollars, and he answered that it was possible.

Bogatin stated that he did go with Bill Murray into the Cloud Room in January of 1971 where

he met two men. However, he did not remember their names except that the name of Tom stuck in his memory. He said that, even though he went there to meet with these men to obtain three thousand dollars, he never asked for or discussed money with them.

The Prosecutor inquired whether Bogatin was asked to sign a promissory note and he answered that he remembered a promissory note being mentioned, but if he signed one he had forgotten about it. When pressed to given a responsive answer, he stated that he didn't think he signed a promissory note and if he did, it escaped his memory. Thereafter, he said he may have signed a note, but he had no recollection of it, and if he were shown the note with his signature, he might remember.

Bogatin was thereafter asked what interest he agreed to pay on the loan and his answers amounted to a denial of ever discussing interest with anyone except that Bill Murray at some time told him if he paid back $120 per week everything would be

all right. He also said he possibly discussed money that night at the Cloud Room with the man who might be the picture he was shown. Thereafter, when asked what he talked to Tom Sala and Bill Murray about, he said just social chit chat and not a loan. Bogatin then acknowledged that there came a point after the social chit chat when he received money at the Cloud Room but he could not recall from whom he received this money.

Bogatin was again asked about the interest rate on this loan and he still insisted that it was never discussed, and that Bill Murray or Tom told him if he paid back $120 per week everything would be all right. He stated that there was no differentiation made as to whether the $120 was principal or interest.

Bogatin testified that after this meeting in the Cloud Room he received approximately $800 from Bill Murray in Suffolk County. He said he made $120 payments every week on Sunday to either Tom, Bill Murray or Joe Lombardi, from January into July.

The Prosecutor then asked Bogatin how

much he paid in "vig" and Bogatin said he couldn't tell him anything about vig or interest but could tell him how much he had paid back. He said he repaid approximately $3,100. When asked what he owed, he said he felt he owed nothing. He was asked who told him he owed nothing and he said he told himself.

At this point, Bogatin was again brought before Judge Lundberg. After hearing part of Bogatin's testimony (subsequent to his last appearance before the court) read back, Judge Lundberg ordered Bogatin to answer the questions relating to what amount of interest he agreed to pay and did pay.

Upon returning to the Grand Jury, Bogatin was asked what interest rate he agreed to pay on the three thousand dollars. He answered that Bill Murray told him there would be no problem as long as he paid back $120 per week and interest would be discussed after he paid the money back. Thereafter, he qualified his answer saying that interest was to be discussed after he paid a substantial

part of the money back. Both the original answer and the qualification contradicted his prior answers on this subject where he said that interest was never discussed.

Bogatin thereafter testified that he didn't know he was getting money from loansharks. The Prosecutor pointed out his prior testimony regarding a promissory note where Bogatin said that when you're dealing with people like this, you don't write things down. Bogatin then admitted that he knew he wasn't dealing in the normal course. but insisted that he did not know he was dealing with loansharks. He was then asked what interest he agreed to pay and he still insisted that he didn't know what his interest rate was. He was questioned as to how much he paid back and he said $3,100. He was asked what he owed and he said nothing as far as he was concerned.

It was at this point that Bogatin was brought before Judge Lundberg for the final time. The Prosecutor told the judge that he thought Bogatin had been wilfully evasive throughtout his

testimony, and contemptuous of the court. Bogatin's testimony subsequent to his last appearance before the court was then read by the stenographer. Thereafter, the foreman of the Grand Jury stated that the Grand Jurors felt very strongly that Bogatin had been evasive.

Judge Lundberg said that he did not disagree with the analysis of the foreman of the Grand Jury after listening to the reading of the transcript. He stated it defied logic that there was no interest rate involved and it defied further human experience that a man of Bogatin's experience would not know what the terms of the loan were. The judge said he could only conclude that Bogatin was wilfully disobeying his directions and wilfully being contemptuous of the Grand Jury. Thereafter, that same evening, the Grand Jurors voted to indict him for his contemptuous and perjurious testimony. As a result of the Grand Jurors' vote to indict Bogatin on July 19, 1971, an indictment was returned on August 12, 1971, charging him with the crimes of Perjury (counts 1 and 2) and Contempt

(count 3).

The petitioner moved to dismiss the indictment and in an order dated December 27, 1971, Suffolk County Court Judge Ernest L. Signorelli granted the motion to the extent that the contempt charge was dismissed, but this order was subsequently reversed and the comtempt charge reinstated by the Supreme Court, Appellate Division, Second Department, in an order dated November 27, 1972, in which the court found that there was sufficient evidence before the Grand Jury to sustain that count of the indictment. Petitioner's application for leave to appeal to the New York State Court of Appeals was denied in an order dated January 18, 1973.

On October 11, 1973, the petitioner pleaded guilty to attempted criminal contempt of the Grand Jury by refusal to testify after being granted immunity in full satisfaction of all counts contained in the indictment and on November 21, 1973, he was ordered to pay a fine of One Thousand (1,000.00) Dollars.

The conviction was unanimously affirmed by the Supreme Court, Appellate Division, Second Department, in an order dated May 12, 1975 and the Honorable Sol Wachtler, Associate Judge of the New York State Court of Appeals, denied leave to that court in an order dated October 30, 1975.

OPINION BELOW

The memorandum decision of the Supreme Court, Appellate Division, Second Department, unanimously affirming the judgment of conviction is officially reported at 48 A.D.2d 674 (1974).

On October 30, 1975, Honorable Sol Wachtler, Associate Judge of the Court of Appeals, denied petitioner's request for leave to appeal to the Court of Appeals. Judge Wachtler's certificate denying leave to appeal is not officially reported.

JURISDICTION

The order of the Supreme Court, Appellate Division, Second Department, was entered on or about May 12, 1975, the date the memorandum decision was rendered. An extension of time within which to file this brief in response to the petition

for a writ of certiorari was granted by this Court, and the time for filing has been extended to and including March 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether a defendat is denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution where the indictment contains a detailed recitation of facts indicating a crime under state law and where the sufficing of the evidence to sustain the charge does not present a federal question?

2. Whether a witness is deprived of his right to counsel under the Sixth and Fourteenth Amendments when he appears before a grand jury where he is not a target of the investigation and he is granted complete transactional immunity?

STATUTES INVOLVED

United States Constitution:

Fifth, Sixth and Fourteenth Amendments*

The Consolidated Laws of New York State:

Penal Law Section 215.51*

Former Code of Criminal Procedure

Section 619-e (2)

> "Immunity"....means that such person shall not be prosecuted ...for or on account of any transaction...which in accordance with the order by competent authority, he gave answers or produced evidence, and that no such answer or evidence shall be received against him upon any criminal proceeding.

* The text of these provisions are reproduced in the Petitioner's brief at pp. 4-5

POINT I

THE PETITION FOR A WRIT OF CERTIORARI IS IMPROPERLY ADDRESSED TO THE NEW YORK STATE COURT OF APPEALS.

A petition for a writ of certorari is properly addressed to the court which rendered final judgment and which was the highest court of the state in which a decision could be had (28 U.S.C. Section 1257). This statute has been interpreted to mean that where the highest court of the state merely declines jurisdiction of a case, the writ must be addressed to the intermediate appellate court which passed upon the merits of the case [Hammerstein v. Superior Court of California, 341 U.S. 491 (1951); Western Union Telepgraph Co. v. Priester, 276 U.S. 252 (1928); Randall v. Tippecanoe County, 211 U.S. 252 (1923)]. In the instant case, since the New York State Court of Appeals, by the certificate of Honorable Sol Wachtler denying leave to appeal to the Court of Appeals, refused to exercise jurisdiction over the case, this

writ should properly have been directed at the Supreme Court, Appellate Division, Second Department [Mellon v. O'Neil, 275 U.S. 212 (1927)].

POINT II

THE INDICTMENT CLEARLY AND SPECIFICALLY STATES A CRIME UNDER NEW YORK LAW AND THE CLAIM THAT THERE WAS INSUFFICIENT EVIDENCE BEFORE THE GRAND JURY TO SUPPORT THIS CHARGE DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION. THEREFORE, NO JURISDICTIONAL DEFECT IS ALLEGED WHICH SURVIVED THE PETITIONER'S VOLUNTARY PLEA OF GUILTY.

The petitioner alleges that there were two jurisdictional defects with regard to the instant indictment which survived his voluntary plea of guilty and that, therefore, the decision of the intermediate appellate court of New York violated established law in finding that petitioner had waived the claim which he now urges upon this Court by his voluntary plea of guilty. The defects in the indictment which petitioner alleges survived his plea are two:

(1) that the indictment does not state a crime and (2) that there was insufficient evidence before the Grand Jury to establish the crime charged. Both the claimed errors are without merit.

While it is conceded that the failure of an indictment to state a crime constitutes a jurisdictional defect which would survive even a voluntary plea of guilty, the petitioner fails to articulate in what respect the indictment does not state the crime of criminal contempt by refusal to testify before a grand jury after having been granted immunity in violation of New York State Penal Law Section 215.51 (the text of which appears in petitioner's brief at p. 5). The indictment charged the petitioner with appearing before a grand jury on a specific date and, after having been granted transactional immunity [see, Former Code of Criminal Procedure Section 619-c(3)], indulged in a persistent course of conduct consisting of evasive and argumentative

responses to legitimate inquiries, in addition to outright refusal to respond, which, taken individually and collectively, constitute the unlawful and contumacious refusal to answer comtemplated by the statute [People v. Ianniello, 21 N.Y.2d 418 (1968)]. The body of the indictment contains a lengthy catalogue of the specific instances of evasive answers and refusal to answer which constitute the crime of contempt. There, the first of petitioner's claims is patently without merit.

The petitioner's claim that the insufficiency of the evidence before the Grand Jury constitutes a jurisdictional defect is likewise without merit. It is noted at the outset that the due process clause of the Fourteenth Amendment does not even make the grand jury requirement of the Fifth Amendment applicable to the states [Hurtardo v. California, 110 U.S. 516 (1884); Morford v. Hocker, 394 F2d 169 (CA, 9th Cir., 1968), cert. denied 392 U.S. 944]. Furthermore, it is well-settled that an indictment re-

turned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits and no constitutional provision prescribes the type of evidence upon which a grand jury must act nor does a claim of insufficient evidence before a grand jury constitute a substantial federal question which is cognizable by this Court. [Lawn v. United States, 355 U.S. 339 (1958); United States v. Costillo, 350 U.S. 359 (1956); Re Robertson, 156 U.S. 183 (1895); Moore v. Missouri, 159 U.S. 673 (1895)].

Since petitioner's claim that the indictment does not state a crime is manifestly without merit and since the sufficiency of the evidence before the grand jury does not amount to a jurisdictial, or even federally cognizable, question, the state court correctly concluded that the voluntary plea of guilty waived any defects [see, Blackledge v. Perry, 417 U.S. 21 (1974); Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970)].

POINT III

THERE IS NO ABSOLUTE FEDERAL CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL DURING AN APPEARANCE BEFORE THE GRAND JURY.

The petitioner also alleges that he was deprived of the assistance of counsel during his grand jury appearance in violation of his constitutional rights.

A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by counsel, notwithstanding that evidence obtained may possibly lay the witness open to criminal charges [In Re Groban, 352 U.S. 330 (1957)]. Even with the development of the "critical stage" analysis whereby the right to counsel has been expanded [see, Boyd v. Dutton, 405 U.S. 1 (1972); Santobello v. New York 404 U.S. 257 (1971); Coleman v. Alabama, 399 U.S. 387 (1970); United States v. Wade, 388 U.S. 218 (1967); Mempha v. Rhay, 389 U.S. 128 (1967)], federal courts have continued the pronouncement contained in

the Groban case [United States v. Fitch, 472 F.2d 548 (CA, 9th Cir., 1973), cert. denied 412 U.S. 954; In Re Grumbles, 453 F.2d 119 (CA, 3rd Cir., 1971), cert. denied 406 U.S. 932].

Notwithstanding the above quoted law, the courts of New York State, on the basis of the policy enunciated in Miranda v. Arizona, 384 U.S. 436, do recognize the right of a witness before the Grand Jury to consult with his attorney in certain instances and that the analysis turns upon the legal rights of a witness which requires the advice of counsel [People v. Ianniello, 21 N.Y.2d 418 (1968), cert. denied 392 U.S. 827]. Thus, in that case, the New York State Court of Appeals indicated that a witness before the Grand Jury would be entitled to consult with his attorney concerning whether the questions asked of him involve the possibility of self-incrimination, the issue of priviliged communications and the issue of whether the questions asked are within the legitimate scope of the Grand Jury proceeding.

In the instant case, the petitioner was advised that he would be called as a witness before the Grand Jury, that he was not a target of the investigation and that he could consult an attorney. When he appeared before the Grand Jury, the petitioner was granted full transactional immunity [CCP Section 619]. No question before the Grand Jury involved the issue of priviliged testimony and the transactional immunity conferred on the petitioner eliminated the possibility that he would incriminate himself. Simarly, the immunity made any issue of the scope of the questions irrelevant in that, even if they were beyond the scope of the inquiry, no substantial right of the petitioner would be affected.

Thus, the grant of transactional immunity, having obviated any legitimate reason for which the petitioner might have sought the advice of counsel to protect a substantial right, the petitioner's Sixth Amendment right to counsel was not violated [see also, United States ex rel.

Buonoraba v. Commissioner of Correction, City of New York, 316 F. Supp. 556 (S.D.N.Y., 1970)].

Finally, even if the appellant were entitled to counsel, the violation of this right would not sanction the crime of perjury or contempt and these charges would remain unaffected by any such defect [People v. Ianniello, supra].

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

HENRY F. O'BRIEN
District Attorney
Suffolk County
Attorney for Respondent

CHARLES M. NEWELL
Assistant District Attorney
of Counsel

Dated: March 10, 1976